

Seminar No 5
Claims for Breach of an International Sales Contract
– Overview, Conditions. Damages. Regulation in the CISG.
Arbitral award.

Getting ready for the seminar

- Read carefully the relevant articles of the United Nations Convention on Contracts for the International Sale of Goods, especially Articles 25 and 74–88 (as for the other articles, you should already be familiar with them from the previous seminars)
- Have the assignment for Seminar No 4 with you – it contains examples for Seminar No 5 (in addition to the ones below)
- Study the assigned chapters in the textbook
- Provided it is uploaded, go through the PPT presentation prepared by your lecturer
- Make sure you have access to other relevant legal acts (see the Information System)
- The PMO Cast (in Czech) – Annulment and Refusal of Recognition of Arbitral Awards can help you prepare for the topic of arbitral awards: <https://www.youtube.com/watch?v=k2dadOqYGnY>

Model Case No 1

In August 2018, KORE spol. s r.o., having its seat and principal place of business in Ostrava, Czechia, concluded a contract with VAN company, having its seat and principal place of business in Novi Sad, Serbia. KORE is a manufacturer of small kitchen appliances and various kitchen equipment. Part of its business activities is carried out under license from KEINZ company (the license applies to certain technical solutions for blenders and juice extractors). The contract concluded with VAN contained, among others, the following provisions:

“From October 2018 to October 2021, KORE commits to supply VAN, in regular quarterly deliveries, with fitness blenders, kettles and juice extractors listed in the KORE catalog for 2018, at the prices listed therein. The order for each delivery, including the quantity of individual items, shall be made in writing by the 30th day of the month preceding the quarter for which the delivery is intended. If the order is not delivered to the KORE headquarters by this time, it is understood that no delivery will take place for the given period. Should VAN fail to order the goods for two consecutive quarters, a contractual penalty of USD 20,000 will be charged. VAN shall not re-export the goods outside the territory of the Republic of Serbia. Unless otherwise agreed for a specific delivery, deliveries shall be made under the following delivery terms: DDP INCOTERMS 2010, warehouse of the buyer in Novi Sad, by 25th of the first month of the respective quarter, FIX. The purchase price shall be paid, based on the invoice, within five days of delivery to the seller’s bank account. In the event of delay in payment of the purchase price, interest on late payment is agreed at the rate of 0.05% of the purchase price for each day of delay. This contract and the partial purchase contracts are governed by Czech law. All disputes arising out of this contract will be resolved in accordance with the Arbitration Rules of the International Chamber of Commerce. The place of arbitration shall be Prague.”

Questions:

- 1. Analyze the contractual structure, determine the legal regime of the contract (considering all the issues involved). Should an invoice be issued for the payment of a contractual penalty, which VAN rejects on the grounds that the contractual penalty is invalid under Serbian law, consider the legal regime of this issue, relying, where appropriate, on the general principles on which the Convention is founded.**
- 2. The contract provides for an interest rate in cases of delay in payment of the purchase price. Define the relationship between interests and damages – specifically consider whether it is possible to claim both at the same time. Also consider whether interest and a contractual penalty could be claimed at the same time provided it was also agreed in case of delay in payment of the purchase price.**
- 3. The April 2019 delivery was delivered to the buyer’s warehouse on April 24, 2019. Due to the Easter holidays in Serbia, the goods were not inspected until May 15, 2019. Upon inspection of the goods, VAN discovered that it had received other goods than ordered, including different colors. KORE rejected the complaint as late. Analyze the situation and find arguments in favor of VAN’s position.**
- 4. The October 2019 delivery was not performed according to the agreed delivery terms. It was not delivered until November 10, 2019. VAN refused to take the delivery in its warehouse, stating it was late. Analyze VAN’s position in terms of possible claims in a situation where VAN left the goods out of the warehouse where they were damaged.**
- 5. In the spring of 2020, the KORE plant burned down. As a result, the company was unable to meet its obligations. Analyze the situation from the point of view of VAN’s claims, KORE’s obligations, and from the point of view of the existence of the contract.**
- 6. Would the situation ad 5) change if it were not a burnout, but a decrease in the value of the currency in which KORE contracted (USD)?**
- 7. Consider a situation in which the March 2020 delivery was not delivered on time due to the unexpected closure of borders in Europe due to the incipient COVID-19 pandemic. Assess this situation in the light of VAN’s claims.**
- 8. In the course of the contract, KORE found that VAN was in a difficult financial situation. Already in the first half of 2020, VAN was late with payments. KORE feared that the purchase price of the January 2021 delivery would not be paid. Outline and give reasons for the possible course of action for KORE.**
- 9. If KORE wished to sue VAN for the non-payment of the purchase price, indicate the method and place of resolution of the dispute. When answering this question, consider whether the arbitration is**

one before a permanent arbitral tribunal or rather an *ad-hoc* procedure. Also consider how the number of arbitrators will be determined.

- 10.** Let us now modify the arbitration clause – assume that an arbitration clause providing for the place of arbitration in Serbia has been validly concluded. An arbitral award ordering the Czech company to pay EUR 2,100 (damages – the Serbian company requested an expert opinion in the context of a wrongly assessed complaint and is now claiming the costs as damages) was issued in Serbia. The Czech company refuses to comply with the award voluntarily. Thus, the Serbian company wants to have the award recognized and subsequently enforced in Czechia. **Name the source of international origin common to Czechia and Serbia which regulates the recognition of arbitral awards. Also state the source of national origin in Czechia that regulates this issue. Compare the two sources of law and determine whether the Serbian company can choose which legal source to follow. Give advice to the Czech company on how to defend itself against the recognition and enforcement of the arbitral award.**
- 11.** Alternatively, would it be possible in Czechia to annul an arbitral award issued in Serbia?

Model Case No 2

Vetarex company, having its seat and principal place of business in Brno, Czechia, operates a wholesale store with veterinary medication, food supplements, and animal feed. In 2019, it started negotiations with a new potential supplier of dog kibble, Hillas company, having its seat and principal place of business in Naples, Italy. The first contact between the two companies took place in May 2019 at an international exhibition in Milan. At the exhibition, representatives of both companies exchanged the following ideas of their future cooperation; the meeting was held in English:

- Start of cooperation: September 2019
- Duration: 12-month cooperation with automatic extension, unless any of the companies sends a notice of termination of cooperation by the end of July of the year preceding the year for which the extension would apply
- Minimum monthly purchase: EUR 8,000 (of any combination of the types of kibble offered) calculated according to the price list; discount of 7% compared to the price list applies; in case of non-compliance, a contractual penalty of EUR 2,000 will be charged
- For monthly purchases of EUR 8,001–15,000: discount of 12% compared to the price list applies
- For monthly purchases over EUR 15,000: discount of 15% compared to the price list applies
- Other issues shall be settled in accordance with Vetarex's general terms and conditions. (These were not exchanged between the parties. Vetarex representative only stated that they are available on the company's website. The terms and conditions are indeed retrievable, however, in Czech only.)

Eventually, the representatives parted ways with the understanding that they would present this preliminary outline of future cooperation to the management of their respective companies and would communicate the decision within one month of the exhibition. After about 3 weeks, Vetarex contacted Hillas by email, stating that it was following up on the communication at the exhibition, summarizing the pre-agreed parameters (which exactly corresponded to the parameters agreed at the exhibition; no specific hyperlink to the terms and conditions was attached, only a general link to the homepage of Vetarex), expressing their agreement with said parameters, and stating its readiness to conclude such a contract. Hillas replied by email within 4 days that it also agreed.

On September 5, 2019, Vetarex sent an order for the selected types of kibble worth EUR 10,000 according to the price list. When the goods were not delivered to Vetarex's central warehouse in Brno on January 20, 2020, as established in its terms and conditions, it emailed Hillas to ask where the goods were. Hillas replied that the goods were ready for collection at Hillas' warehouse in Naples as of September 10, 2019. Vetarex claimed that, according to its terms and conditions, the DAP delivery term – *i.e.*, DAP Vetarex central warehouse, Brno – applied.

Questions:

1. From March to June 2020, Hillas had a production outage and was unable to deliver the ordered kibble. This was due to the measures taken by the Italian Government as a response to the COVID-19 pandemic, forcing Hillas to close its production plant. To meet the demands of its clients, Vetarex was forced to order kibble from another producer, but at a higher price than it would have paid for the corresponding types of Hillas' kibble. Vetarex wants to recover the price difference from Hillas. **Classify the described claim and assess whether it is justified.**
2. **Consider whether, under the same circumstances (production outage on Hillas' part), Vetarex could have reacted by not ordering the kibble from another producer, waiting for the orders made and claiming lost profits from Hillas based on the number of orders that were not performed.**
3. Due to unexpected changes in the market, there was a sharp and unexpected increase in the price of input complementary food and vitamin ingredients for the production of kibble available in EU countries. Hillas was forced to raise the price of kibble significantly, which, however, made its products no longer competitive with products from the USA and Asia. Therefore, Vetarex did not want to continue to purchase the kibble, but Hillas insisted on the minimum purchase clause and the agreed contractual penalties. **Analyze the positions of both parties, classify the situation described, and assess whether (and if so, how) the CISG responds to it. If appropriate, indicate the way(s) of dealing with such a situation.**